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Nos. 115, 116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM R. JOHNSON

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY AND STUART SOLOMON BROWN

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the trial court (AR. 133) is not officially reported. The opinion of the Circuit Court of Appeals (AR. 207) is reported in 149 F. 2d 31.

Jurisdiction

The judgments sought to be reviewed were entered May 2, 1945 (AR. 237). The petition for writs of certiorari was filed June 6, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

Questions Presented

1. Whether the action of the Circuit Court of Appeals in examining the affidavits and other documents which comprised the only evidence offered in support of, and in opposition to, the motion for new trial in the light of the correct rule of law, after finding that the trial court in denying the motion had erroneously considered the evidence under inapplicable rules of law, requires review by this Court.

2. Whether under Rule 38, par. 1, petition for certiorari will be considered where the petition is accompanied by what is admittedly a certified transcript of only a small portion of the transcript of the record in the case.

3. Whether under Rule 38, par. 3, petition for certiorari will be considered by this Court where, without enlargement of time by order or stipulation, petition and purported printed record are thirteen days after filing delivered with demand for acknowledgment of service and fifty-five days after filing are delivered unconditionally.

Statement

On March 29, 1940, an indictment was returned against the respondents and others (Nos. 4 and 5, 1942 Term, pp. 2-25). The first four counts charged the defendant John-

son with wilful attempts to defeat and evade a large part of his income taxes for the calendar years 1936-1939, inclusive, and charged the co-defendants with wilfully aiding and abetting, etc., Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy (*Johnson* v. *United States*, 319 U. S. 503, 505-506).

Respondent Brown was found guilty on the last three counts. The other respondents were found guilty on all five counts. Johnson was sentenced to imprisonment for five years on each of the first four counts and two years on the fifth count, all to run concurrently; he was fined $10,000 on each count with a provision that payment of one $10,000 fine should discharge all fines. The other respondents were given lesser sentences and fines (*id.*, R. 462).

Chronology of Prior Reviews and Proceedings

The Circuit Court of Appeals for the Seventh Circuit reversed on the ground that the legal life of the grand jury had expired prior to the return of the indictment. *Johnson* v. *United States*, 123 F. 2d 111.

This Court, on writs of certiorari granted February 2, 1942, after argument April 10, 13, 1942 and reargument October 12, 1942, at this Court's direction addressed solely to the question of sufficiency of the evidence, on June 7, 1943 entered its judgment reversing and remanding the causes to the Circuit Court of Appeals "for proper disposition in accordance with this Court's opinion." *United States* v. *Johnson*, 319 U. S. 503.

Mr. Justice Frankfurter entered an order denying stay of mandate but without prejudice to the consideration and disposition by the court below of any motion filed under

Rule 2(3) of the Criminal Appeals Rules and any motion collateral thereto (R. 10).

On motion of the defendants and over objection of the Government, the Circuit Court of Appeals remanded to the District Court to permit motion for a new trial (R. 9-10). Motion for new trial was filed in the District Court on October 29, 1943 (R. 12).[1] The District Court, after hearing, filed an opinion concluding that the motion should be denied (R. 460-516) and entered its order accordingly (R. 534-536).

The Circuit Court of Appeals filed an opinion (R. 578-586) holding the trial court had not abused its discretion and entered judgment of affirmance accordingly May 6, 1944 (R. 586).

Respondents filed a petition for certiorari (Nos. 153 and 154, 1944 Term) which the Government opposed.

While the petition was pending respondents asked the Solicitor General to investigate a report that William Goldstein (the Government witness whose false testimony was the primary basis of the motion for new trial) had recently filed amended and delinquent income tax returns for the years 1937-1943 on behalf of his son in which were included the income and deductions on a building (the Albany Park Bank Building) at 3424 Lawrence Avenue which Goldstein had testified at the trial he had bought for Johnson at Johnson's request with Johnson's money. Thereupon and on October 3, 1944, the Solicitor General filed in this Court a supplemental memorandum admitting that,

> "In the returns filed [by Theodore Goldstein, son of William Goldstein] the rents from the building

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[1] A complete analysis of the grounds of the motion and of the evidence upon which it was based is set out in the defendants' brief in support (R. 19-34).

were reported as income and deductions were taken for depreciation and expenses."[2]

After referring to circumstances under which the returns were allegedly filed the Solicitor General concluded:

> "These reported actions and statements of Goldstein, as to which we have not consulted him, are not inconsistent with his trial testimony. * * * He did not testify that Johnson was the owner of the building nor that the money Johnson gave him to purchase it belonged to Johnson."[3]

On motion of respondents, this Court deferred consideration of the petition conditioned upon the prompt filing in the Circuit Court of Appeals for the Seventh Circuit of a

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[2] The Government had already recognized the probative weight of deductions in tax returns (Gov't. Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 95):

> "Again, the ownership and sale of real estate would be indicated by deductions for real estate taxes, etc., and by the termination of such deductions."

In the return for 1940, from his salary of $2600 from another source, T. Goldstein deducted the net operating loss on the building, $1,631.08, attributable to excess of real estate taxes and depreciation over the income of $900 on the building, and so reduced his taxable net income to $968.92 (AR. 59-60). In each of the returns the depreciation schedule showed date of acquisition as July, 1937, the month in which Goldstein purchased the property (AR. 48, 52, 56, 60, 64, 68, 72).

[3] The trial judge summarized Goldstein's testimony as follows (R. 512):

> "Goldstein testified on the trial that he purchased the property for Johnson and paid for it with currency given him by Johnson; that he took title in the name of his son Ted Goldstein and subsequently caused a quit-claim deed to be delivered to Johnson."

The testimony to which the trial judge thus referred is as follows (R. 145):

> "I was requested by Mr. Johnson to go out there and purchase the building for him. * * * I purchased that property at the request of Mr. Johnson. * * * Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit-claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Bank Building property was purchased July 15, 1937."

motion to reopen proceedings on the motion for new trial and until the disposition of that motion (AR. 18-19).

The Circuit Court of Appeals, on November 16, 1944, on motion of defendants and over objection of the Government, vacated its order affirming the order of the District Court denying defendants' original motion for new trial and remanded to the trial court (AR. 18-19). The pending petition in this Court having thus become moot, it was dismissed on motion of counsel for the defendants (323 U. S. 806).

The trial court, on motion of respondents (AR. 23-25) and over opposition, required the Government to produce the income tax returns in question (AR. 26-27). Respondents then filed an amended motion for new trial (AR. 28-34) in which the record on appeal from the trial court's denial of defendant's original motion for new trial was made an exhibit and incorporated by reference (AR. 29). There was thus included in the amended motion for new trial the original motion for new trial with all its supporting affidavits. Respondents also relied on the fact that the returns of Theodore Goldstein procured and filed by William Goldstein demonstrated not only that the latter had testified falsely at the trial with respect to the purchase of the Albany Park Bank Building but showed as well that his affidavits filed by the Government in opposition to the original motion for new trial contained deliberately false statements.

The trial court, after hearing, entered its opinion and order denying the motion (AR. 133, 171). The opinion considered the evidence solely under the rule that motion for a new trial on the ground of newly discovered evidence bearing on the guilt or innocence of a defendant (as distinguished from evidence bearing on the fairness of the defendants' trial) will be granted only when the newly discovered evidence is not merely impeaching or merely cumu-

lative in character and if *added* to the record *would probably result in a verdict of acquittal on new trial* (AR. 136, 167). The trial court made no reference to the rule formalized in *Larrison* v. *United States*, 24 F. 2d 82, 87 (C. C. A. 7)[4] and now acknowledged by the Government to be applicable to motions for new trial based upon a showing of false testimony (Pet., pp. 49-50).

On the appeal from the order denying the amended motion for a new trial the Circuit Court of Appeals, holding inapplicable the rule of *Berry* v. *State*, 10 Ga. 511, expressly accepted as controlling by the trial court, carefully considered all the evidence including the affidavits presented on the first motion and the income tax returns and affidavits submitted for the first time in support of the amended motion for new trial. It held (AR. 225):

> "In our considered judgment Goldstein testified falsely at the trial and has been so thoroughly discredited that his affidavits offered in opposition to the motion for a new trial carry little, if any, weight. Proof therein contained affords no substantial support for a finding that he testified truthfully at the trial."

And it concluded (AR. 227):

> "It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, *unerringly* points to the fact

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[4] The rule as thus stated by the Seventh Circuit in that decision is as follows:

> "• • • a new trial [because of false testimony] should be granted when
>
> (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) That without it the jury *might* have reached a different conclusion.
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not learn of its falsity until after the trial."

that Goldstein's trial testimony was false. The finding of the trial court to the contrary was, in our judgment, an abuse of discretion."

Applying the rule of the *Larrison* case the court found all of the requisites thereunder to be present. Its careful opinion also sustains its holding that there was no lack of diligence (AR. 230).[5]

Detailed Discussion of Facts Is Improper on Petition

It is unnecessary here to enlarge upon the facts as stated in the opinion of the Circuit Court of Appeals, nor is it appropriate herein to enter into the necessary correction of the statement of facts by the Government; consisting as it does of a highly argumentative exposition of the Government's interpretation of the evidence founded in many instances upon inaccurate or incomplete statements of the testimony of witnesses. Clearly the evidence in the case merely presents its individual problems of relevance, inference, and persuasivenes. Neither could any substantial benefit be now derived from such corrections since the record upon which such corrections must ultimately rest, even if it were otherwise properly here, has not been furnished in the number of printed copies necessary to supply the individual justices.[6] As the case stands the Government seeks to have the petition for certiorari decided upon its representation of the facts and such additional appreciation thereof as may be gleaned by the justices only from the certified copies of the records in the office of the Clerk.

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[5] In closing, the Circuit Court of Appeals also noted the error of the trial court involved in rejecting the evidence as cumulative because it went to matters as to which there was evidence at the trial. In so doing it emphasized that even under the rule of *Berry* v. *State*, 10 Ga. 511, purportedly applied by the trial court, evidence in support of a new trial is rejected on that ground only where it is *merely* cumulative.

[6] See Point II (c), infra, p. 25.

The False Testimony Was Highly Material

It is important here only to point out that despite the tardy effort made by the Government, not so much by direct statement as by implication, to show that the testimony of William Goldstein was in any event not material (Pet. 9-11, 15, 17, 18), such testimony was an essential element in the case. Indeed the trial court stated (AR. 138):

> "The ownership of these various properties was a subject of lively interest on the trial."

Goldstein was the Government's principal witness on the ownership of all of these properties and its only witness on some of them, notably the Albany Park Bank Building. And the Circuit Court of Appeals in its opinion states (AR. 209):

> "That Goldstein's testimony was material and, if false, was highly prejudicial to the defendants, *is not in dispute.*" (Emphasis supplied.)

The Government apparently seeks to create the impression that its case was sustainable on two independent and unrelated theories, (1) the ownership theory—that Johnson owned and operated gambling houses as a unit and derived winnings therefrom on which he attempted to evade income tax payments, and (2) the expenditure theory—that Johnson's cash expenditures during each of three of the four years covered by the indictment were in excess of his available cash resources and reported income (Pet. 10, 18).

This is contrary to the contention of the Government in this Court. In its original brief on the merits here, the Government said (p. 5):

> "Moreover, the court erred in assuming that the so-called 'ownership' and 'expenditure' theories were wholly independent of each other. They were not. Each gave support to the other."

And in its brief on reargument the Government said (p. 5):

> "The 'ownership' and the 'expenditure' theories are thus not separate and distinct branches of this case. It is erroneous, we submit, to attempt to isolate each theory, and to search the record for support of each. The correct approach is to consider them together, since each offers substantial support for the other."[7]

This Court treated the two theories as being interrelated, holding (319 U. S. 503, 517):

> "That he [Johnson] had large, unreported income, was reinforced by proof which warranted the jury in finding that certainly for the years 1937, 1938, and 1939, the private expenditures of Johnson exceeded his available declared resources."

Goldstein's testimony was material under both theories.—Furthermore, even if the premise of two independent theories were valid, the Government's contention is bad.

Materiality under ownership theory.—The Government states (Pet. 10):

> "The testimony of Goldstein, now held to be false by the Circuit Court of Appeals, had little bearing on this, the 'ownership theory' of proof, which turned on the issue of the proprietorship of gambling houses."

This statement does not square with the contentions made in the Government's brief on reargument in this Court in which it relied heavily on Goldstein's testimony in developing the so-called "ownership" theory. In that brief under the heading "The Operation of the Gambling Houses as a Unit" (p. 9), the Government stated (pp. 27, 29-30):

> "From June 1936 to July 1938 banking transactions of the Horseshoe, Lincoln Tavern, D & D Club and

[7] The Government thus sought to avoid the point that mere ownership without more was inadequate proof since Johnson was shown to have reported and paid tax on income of over $800,000 during the four years in question.

> Harlem Stables were handled at a single currency exchange, the Albany Park Currency Exchange, through a single account. * * * [Gov't Br. on Rearg., p. 27.]
>
> "In July 1938 all of this business was taken away from the Albany Park Currency Exchange (2 R. 477-478). Sommers at this time told the owner of the Albany Park Exchange that the respondent Brown was getting the business (2 R. 477). Brown opened the Lawrence Avenue Currency Exchange near the Albany Park Exchange in July 1938 (2 R. 478, 532). Sommers, Hartigan and Kelly stated to revenue agents that they cashed checks at the Lawrence Avenue Exchange (2 R. 459, 463, 468). The Lawrence Avenue Exchange carried all of this business as a single account. * * *" [Gov't Br. on Rearg., pp. 29-30].

In the same brief on reargument at page 30 and under the heading "The Ownership of Johnson" the Government stated:

> "Johnson was shown to be the owner [sic] of the building in which Brown's currency exchange, the Lawrence Avenue Currency Exchange, was located (2 R. 56-57. [The record reference is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.] This latter building was purchased by Johnson on July 16, 1937 (2 R. 57). [This record reference again is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.]"

Materiality under expenditure theory.—The Government's patently absurd attempt (Pet. 15) to minimize the importance of the Goldstein testimony, without which Johnson would not have been charged with enormous personal expenditures which he denied having made, does not merit discussion here. If the Court is interested in an analysis of the charged expenditures, an accurate discussion of them is found in the record (R. 20-23).

Without stopping now to detail the inaccuracies in the

government's computation, it is sufficient to note that the invalidity of this contention as to immateriality of the false testimony is apparent from the fact that Johnson directly, categorically, and completely denied the truth of Goldstein's testimony with respect to all of the properties involved about which there is any controversy. (Nos. 4 and 5, 1942 Term, pp. 955-957). But for Goldstein's testimony, therefore, the jury would not have been authorized, as it was, under the charge of the trial court, to disregard all of the defendant Johnson's testimony. The trial court instructed the jury that it was at liberty to disregard all the testimony of any witness if it believed any of its testimony to be false (id., pp. 1006). In view of the clear conflict either Johnson or Goldstein lied. The jury could not believe Goldstein without believing Johnson's testimony to be at least in part false. Therefore, believing Goldstein, the jury was at liberty under the charge to reject all of the defendant Johnson's testimony. The prejudicial effect of this fact cannot be gainsaid in view of this Court's statement in its opinion (319 U. S. 503, 516):

> "* * * During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he 'never had any financial interest in any gambling club operated by any of the defendants.'
>
> "The jury decided this central issue against Johnson."

If the jury had believed Johnson, and it cannot be denied that they *might* have done so in the absence of the conflict of Goldstein's testimony, they would clearly have reached a different result. That false testimony presenting a square contradiction of a defendant's testimony, in a case in which the "*Falsus in unus, falsus in omnibus*" charge is given, is prejudicial to the extent of requiring a new trial is well

established. *Pettine* v. *New Mexico*, 201 Fed. 489, 493 (C. C. A. 8); *State* v. *Mounkes*, 91 Kan. 653, 138 Pac. 410, 411, cited with approval in *Martin* v. *United States*, 17 F. 2nd 973, 976 (C. C. A. 5).

Applicable here to the Government's attempt to now minimize the effect of Goldstein's testimony is the statement of Mr. Justice Van Devanter in *Miller* v. *Oklahoma*, 149 Fed. 330, 339 (C. C. A. 8):

> "When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

As stated above, respondents perceive no benefit to the court or themselves in advancing here a counter-argumentative statement as to the evidence in the record and the propriety of the inferences to be drawn therefrom. This Court has not been furnished with a complete duly authenticated copy of the transcript upon which this case was decided by the court below and an adequate number of copies thereof for the use of the individual justices. It would therefore be impossible for the court even to reach an informed judgment on the merits of any such argument.

Argument

I

Reasons for Refusing Writ

The Government's statement of the question presented is so vague and general that it can hardly be deemed to comply with the provision of Rule 38, par. 2, that the court will consider "only the questions specifically brought forward by the petition." Cf. Hart, *Supreme Court—1937 and 1938 Terms*, 53 Harv. 579, 594. Significantly, the Government fails to set forth any "Specification of Errors Intended to be Urged" which would serve to point out the rulings specifically challeneged. While specifiaction is not by the rules required in a petition for certiorari but only in the supporting brief, if any (Rule 27, par. 2(e), 38, par. 2), in this case the Government has combined both petition and supporting brief in one document. Their absence here plus the vaguity of the stated Reasons for Granting the Writ confirms the impression that the Government is here merely seeking another review of the facts, in a record now constituting many thousand pages.

1. **The first "Reason for Granting the Writ" is patently inadequate.**—This Point (Pet., pp. 41-49) is confined largely to representations and argumentations as to inferences properly to be drawn from the evidence. The closest it comes to concretely setting out any purported reason for granting the writ is contained in the statement (Pet., p. 42):

> "The decision is [a] based on so serious a departture from the accepted course of review of the granting or denial of motions for new trial, and [b] in the process discloses so great a misapprehension of the significance of the material presented, [c] that it casts an unwarranted reflection upon the conduct of the case and

[d] opens the way to indefinite prolongation of criminal proceedings."

(a) The alleged "departure from the accepted course of review" is not developed. This apparently refers to "Reason No. 2" considered below.

(b) "So great a misapprehension of the significance of the material presented" by the court below is not recognized by this Court as a reason for granting a writ. This is a familiar plaint but this Court does not grant certiorari to review evidence and discuss specific facts. *United States* v. *Johnston*, 268 U. S. 220, 227; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 509; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178.

(c) Aside from its novelty as a ground for certiorari, the assertion that the decision "casts an unwarranted reflection upon the conduct of the case" is manifestly ill-founded. The reflection upon the conduct of the case by the Government arises, not from the decision of the Circuit Court of Appeals but from the record made. The Circuit Court of Appeals surely is not responsible for the fact that the prosecution, after indicting Goldstein for perjury in protecting his client Skidmore, then indicted him with Johnson but dismissed as to him on the day the case was called (AR. 210). Neither is the court responsible for, and probably the prosecution did not anticipate, Goldstein's implicating statement, "My lawyer has not told me anything about what the deal was" (AR. 210). The Court of Appeals decision is not responsible for the fact that after almost five years the perjury indictment against Goldstein still goes untried (AR. 210). Neither is the court responsible for the record fact that the prosecution has both before and after this Court's decision interceded to block Bar Association investigation of Goldstein's perjury in this case (AR.

210). Certainly the Circuit Court of Appeals cannot be held responsible for the cynicism inherent in the filing of bills of particulars in indictments against the respondents other than Johnson, charging them to be the owners of the very gambling houses here asserted to have been owned by Johnson.[8]

Neither is the opinion of the Circuit Court of Appeals responsible for the statement of the Solicitor General to this Court (Supp. Mem. Oct. 3, 1944, p. 4):

> "These reported actions and statements of Goldstein, as to which we have not consulted him, are not inconsistent with his trial testimony."

This representation by the Solicitor General was made at a time when the Government had in its possession the affidavit, made *ante litem motam* August 11, 1944, of its own officer, Wodrick, swearing that as to the Albany Park Bank Building Goldstein had said (AR. 104):

> "he did not know who owned that property * * * that he *received money from persons unknown for the purchase of that building.*" (Emphasis supplied)

The picture is not a pretty one, but the record is of the prosecution's making and cannot now be erased.

(d) That the case "opens the way to indefinite prolongation of criminal proceedings" is a glittering generality without foundation. Admittedly, a long period has ex-

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[8] In separate criminal proceedings against Sommers, Indictment No. 32154; Hartigan, Indictment No. 32155; and Kelly, Indictment No. 32156 (now pending in the United States District Court for the Northern District of Illinois, Eastern Division), and while the instant case was pending on the merits in the Supreme Court, the Government filed Bills of Particulars, charging specifically that these defendants were the real owners, not merely nominal owners or agents for Johnson, of the gambling houses, and that they, as the real owners, received as personal income the very same income from those houses which in this case Johnson is charged with having received and failed to pay a tax upon.

pired since the trial of respondents but the Circuit Court of Appeals opinion (AR. 229) adequately shows that respondents have been at no time guilty of dilatory tactics. If the Solicitor General refers to the time necessary for new trial under the order of the Circuit Court of Appeals, then it is apparent that his assertion of "disservice to the cause of administration of the criminal law" arises from a radical misconception of the fundamental objective of the criminal law, a confusion of the means with the end. Certainly, in view of this Court's persevering vigilance to protect the right to a fair trial, and against errors that affect the "fairness, integrity or public reputation of judicial proceedings" (*United States* v. *Atkinson*, 297 U. S. 157, 160; *Johnson* v. *United States*, 318 U. S. 189, 200), this contention cannot be entertained here.

Flagrant misstatements by the Government.—We cannot forego pointing out some of the more glaring misstatements of the Government set out under this Reason for Granting the Writ.

Misrepresentation as to Goldstein's testimony as to the Albany Park Bank Building.—The Government purports (Pet., p. 42) to have set out the nature of Goldstein's testimony concerning the Albany Park Bank Building at pages 10-20. Reference to the cited pages shows only one reference to the Albany Park Bank Building (p. 13). The Government's purported resumé of Goldstein's testimony as to the building (Pet., pp. 12, 42-43) distorts Goldstein's testimony as to the building by generalizing it with his testimony as to other properties.

But like most false witnesses, Goldstein made a misstep. Although his testimony as to all the other properties was so careful and so uniform as in itself to create cause for suspicion, when he testified as to the Albany Park Bank Building he said (R. 517-518):

"I was requested by Mr. Johnson to go out there and purchase the building *for him.*" (Emphasis supplied.)

The trial court summarized this as follows (R. 512):

"Goldstein testified on the trial that he purchased the property for Johnson and paid for it with currency given him by Johnson."

As said by the Circuit Court of Appeals (AR. 211):

"It is difficult to discern how Goldstein could have any more definitely placed the ownership of this property in Johnson."

Much of the evidence, particularly the tax returns, was addressed to demonstrating the falsity of these statements. The Government contended not merely that Goldstein's trial testimony placed ownership of the Albany Park Bank Building in Johnson but it asserts that Goldstein's statement referred to in the affidavit of Blockus on the original motion for new trial "was in effect an assertion that Johnson owned the building" (Pet., p. 32).

Misrepresentation as to admission by Johnson's counsel.—The Government asserts (Pet. 44-45):

"the building in question was described by Johnson's counsel in his opening statement at the trial as having been bought by Johnson. * * * These statements of Johnson's counsel, though later argued to be erroneous, were made in Johnson's presence and never corrected during the trial."

It is not true that these statements of Johnson's counsel were not corrected at the trial. The Government is flatly contradicted by the record. At the trial Johnson testified (Nos. 4 and 5, 1942 Term, p. 955):

"I do not own the Albany Park Bank Building or any part of it, and I did not employ Goldstein to buy the property for me and never gave him any money to

make the purchase and no deed was ever delivered to me by him."

Johnson's counsel in his brief in the Circuit Court of Appeals on the merits fully explained his inadvertent and erroneous misstatement (R. 334, note). It was not relied upon at the trial, nor on appeal or in this Court in review of the case on the merits. This explanation is referred to in the Petition at page 23, but is ignored by the Government when the reference to it is reiterated and heavily relied upon (Pet. 30, 32). Aside from this timely retraction of the "admission," it is important to note that no admission by Johnson's counsel could in any event bind the other defendants.

2. **The second stated Reason for Granting the Writ is frivolous.**—As we understand it, the Government under this Point (Pet. 49) agrees that the rule stated in the *Larrison* case (supra, p. 7) is correct and is the applicable test where motion for new trial is based on proof of false testimony (Pet. 49-50). For it states, "We should have no quarrel with an extension of that rule to a case where there has been a clear and convincing showing of perjury, found by the trial court." The Government argues in effect that the applicability of the rule depends upon the quantum and degree of conclusiveness of the evidence. The quantum in any particular case will, under the rule, obviously determine the result in that case. But plainly the quantum of the evidence cannot determine the rule to be applied.[9] Indeed, in the *Larrison* case itself, the court applied the rule to affirm denial of a new trial because the evidence was found insufficient.

[9] If the quantum determines the rule to be applied, and the Government concedes its proper application in cases of recantation, it can hardly object to its application here for it is well-recognized that a formal affidavit of recantation by a self-confessed perjurer is the most unreliable of all testimony. *Harrison* v. *United States*, 7 F. 2d 259, 262 (C. C. A. 2); *Dale* v. *United States*, 66 F. 2d 666 (C. C. A. 7); *People* v. *Shiletano*, 218 N. Y. 161, 112 N. E. 733.

The only semblance of allegation of error of law—entirely unsupported by citation—appears in the Government's contention (Pet., pp. 50-51) that the court below made—

> "a preliminary departure from recognized practice in undertaking to review *de novo* the affidavits submitted to the trial court and on that basis reversing the trial court's finding."

The Government adds that this violates the rule that the trial court shall be vested with "responsibility for determinations of fact" on motions for new trial.

The Government, however, does not deny, in fact its quotation from Judge Barnes' opinion (Pet., p. 39) shows, that he was governed in his consideration of the evidence by the rule of the *Berry* case. That rule, as the court below held, obviously has no application where false testimony is the ground of the motion for new trial. The trial court's reasoning and pivotal conclusion that, under the rule of the *Berry* case, each and every item of defendants' evidence "is excluded from the classification 'newly discovered evidence warranting a new trial'" (AR. 167), cannot reasonably be urged to constitute findings or a conclusion by that court under the controlling but radically different rule of the *Larrison* case as to the admissibility and sufficiency of the evidence to justify a new trial.

Insofar as the admissibility or sufficiency of the evidence under the rule of the *Larrison* case was concerned, that question was necessarily decided by the appellate court as a matter of first impression and its decision was within the court's power. Had the court not done so it would have been required to employ the time-consuming procedure of a remand to the trial court for his reconsideration of the evidence in the light of the correct rule of law. Cf. R. S. Sec. 701, 28 U. S. C. Sec. 876 (made applicable to Circuit Courts

of Appeals by the Act of March 3, 1891, c. 517; Sec. 11, 26 Stat. 826; *Ballew* v. *United States*, 160 U. S. 187, 201; *Realty Co.* v. *Montgomery*, 284 U. S. 547, 550); *Cole* v. *Ralph*, 252 U. S. 286, 290. The court below did not substitute its findings for those of the trial court. It made findings because no findings under the applicable rule of law had been made by the trial court. This is perhaps not important because where, as here, the record is entirely documentary, it is the clear duty of the reviewing court in any event to examine the record and determine for itself the meaning of the written evidence. As pointed out by Robert L. Stern, *Review of Findings of Administrators, Judges and Juries*, (1944), 58 Hary. L. Rev. 70, 112-113:

> "But where the evidence is entirely documentary or otherwise undisputed, the appellate court is in as good a position as the trial judge to determine the facts and to draw inferences of fact."

(See also id., pp. 111, 114.) The discussion of this point is elaborately documented with supporting authorities. This has long been the rule in the Seventh Circuit. *Uihlein* v. *General Electric Co.*, 47 F. 2d 997; *Chain O'Mines* v. *United Gilpin Corp.*, 109 F. 2d 617; *Himmel Brothers Co.* v. *Serrick Corp.*, 122 F. 2d 740. It has been given the same application in cases where the relief involved was discretionary. *Nashua Mfg. Co.* v. *Berenzweig*, 39 F. 2d 986 (citing *Elbers et al.* v. *Chicago Printed String Co.*, 39 F. 2d 315); *Corica* v. *Ragen et al.*, 140 F. 2d 496. It is equally applicable in cases involving review of action on motions for new trial. *Hamilton* v. *United States*, 140 F. 2d 679, 681 (App. D. C., 1944), reversing *Hamilton* v. *United States*, 31 A. 2d 887 (see dissenting opinion, p. 891); *Arbuckle* v. *United States*, 146 F. 2d 657 (App. D. C., 1944).[10]

[10] The Government (Pet. 51) also apparently objects to the Circuit Court of Appeals' statement that it would have been improper for the trial court to weigh the demeanor of Goldstein as a witness against affidavits

No other errors of law are even purportedly suggested by the Government. The discussion (Pet. 51-53) as to the sufficiency of the evidence to justify a new trial under the rule applicable when false testimony is *not* shown is manifestly beside the point and is not directed to a ground of decision. However, respondents do not waive their contention that, even under this rule, a new trial was required.

3. **The third stated "Reason for Granting the Writ" is merely repetitious.**—We are unable to understand precisely what it is the Government is driving at in its point III (Pet. 53). It appears to be merely a restatement of its reiterated contention that the court below wrongly construed the record and that this Court should intervene to re-review that record solely for the purpose of re-evaluating the evidence. This redemonstrates the basic misconception of the scope and purpose of the certiorari jurisdiction upon which the petition is founded.

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presented by defendants and made by persons whom the court had not seen or heard. But this is addressed to a contention made by the Government in opposing defendants' appeal and was not a ground of decision though obviously correct.

The trial court did not purport to take into account the demeanor of Goldstein as a witness in evaluating the affidavits of the many affiants for defendants (AR. 133-169), and defendants in their assignment of errors (AR. 190) assigned no error on that ground. The language of the majority opinion is addressed to the contention of the Government adopted by Judge Minton in his dissent (AR. 231). It is not a ground of decision. The Government's suggestion (Pet. 51) that no request for testimony was made and objection that there was no remand for the taking of oral testimony is therefore a tilting at its own strawman. If such remand had been made, then the Government might have had just cause to complain of the unnecessary prolongation of these proceedings.

II

Breach of the Rules of This Court Requires Dismissal of the Petition

The petition for writs of certiorari should be dismissed for two reasons:

1. **The petition is not accompanied by a certified transcript of the record in the case.**—Rule 38, par. 1, of this Court provides:

> "A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the United States Court of Appeals for the District of Columbia shall be accompanied by *a certified transcript of the record in the case*, including the proceedings in the court to which the writ is asked to be directed." (Emphasis supplied)

Here the petitioner has not filed a certified transcript of the record in the case as required by Rule 38, par. 2, and under that rule the petition was not filed in time.

(a) **The clerk's certificate does not purport to certify the entire transcript.**—The so-called printed record "AR", being the only record served on respondents, contains merely a certificate of the Clerk of the Seventh Circuit as to the correctness of the copy of the opinion and judgment of the Circuit Court of Appeals. The only other certificate appearing in the transcript filed with the Clerk of this Court (not printed) is attached to a copy of the book to which the Government refers in its brief as "AR" and certifies merely:

> "that the foregoing *printed* pages contain a true copy of the printed record, filed on the fifth da. of February, 1945 in" etc. (Italics supplied)

This certificate does not certify that the printed volume is a true and complete copy of the transcript of record in the case and it is not.

(b) **It is admitted that the certified transcript is incomplete.**—Reference to the certificate of the Clerk of the District Court (AR. 205, 206) and to the praecipe to which it refers (AR. 188) discloses that this volume so certified by the Clerk of the Circuit Court of Appeals is but a small part of the record made in the District Court and certified to the Circuit Court of Appeals, and on which was based the judgment of the Circuit Court of Appeals here sought to be reviewed. That the certified transcript is only part of the complete transcript is admitted by the Government in its petition. Footnote No. 1 on page 1 of the Government's petition reads:

> "The record in this case consists of three separately printed records, the original record in this Court on review of respondents' convictions (Nos. 4 and 5, 1942 Term); the record made on respondents' petition for certiorari for review of the judgment of the Circuit Court of Appeals affirming the action of the District Court in denying respondents' subsequently filed motion for a new trial (Nos. 153 and 154, 1944 Term); and a record of additional proceedings on respondents' amended motion for a new trial. The first record on the motion for a new trial will be referred to by the designation 'R.' and the record of additional proceedings on the amended motion by the designation 'AR.' Reference to the original record on review of respondents' convictions will be shown by record references to Nos. 4 and 5, 1942 Term." [10]

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[10] This Court accepts as the record only the copy duly authenticated by the clerk of the court below—not the mere statement of a party as to what constitutes the record. *Ray* v. *Law*, 3 Cr. 178, 179; See *Campbell* v. *Reed*, 2 Wall. 198.

The only part of the above which was certified by the clerk of the court below and filed by the Government in this proceeding is the volume designated in the footnote at "AR."

(c) **The Government's incorporation by reference in violation of the Rules defeats the main purpose of certiorari practice.**—Obviously petitioner has violated Rule 10, par. 3, made applicable by Rule 44 in that it is asking this Court to incorporate by reference the printed records in Nos. 4 and 5, 1942 Term, and the printed record in Nos. 153 and 154, 1944 Term. And this in the absence of any certificate from the clerk of the court below that such printed documents are a part of the record in this case. Superficially, this might be classified as a technical, although not unimportant, violation of this Court's rules in view of the fact that these printed records were a part of the record in this case in the court below (AR. 8). In fact, however, the seriousness of this attempt to incorporate this material by reference rather than to furnish printed copies of it to the court as required by Rule 38, par. 7, lies in the fact that the Justices will not have immediately available portions of the record upon which the Government relies in the petition. This applies particularly to the printed record in Nos. 153 and 154, 1944 Term (Vol. 3 of the Bill of Exceptions herein, AR. 8).[11] Even casual examination of the petition discloses that the 41-page "Statement" is almost entirely taken up with a highly controversial discussion of the evidence based largely upon reference to the evidence contained in record ("R.") of which only a single copy is on file in this Court. Without a copy of the record ("R.") itself no Justice of this Court could do more than form an impression as to the de-

[11] It is of negligible importance so far as the record in Nos. 4 and 5, 1942 Term (Vol. 2 of the Bill of Exceptions herein, AR. 8) is concerned as no controversial reference to the evidence in that record is likely (cf. stipulation, particularly paragraph (a), AR. 593-594).

gree of the intesity of the Government's disagreement with the views expressed by the court below. He could arrive at no informed conclusion as to whether such disagreement had any evidentiary support.[12]

(d) **Important portions of the record are neither certified nor on file in this Court.**—The failure to file any certificate as to the completeness of the transcript might in some cases be merely technical, to be corrected by withdrawal of the record for the purpose of refiling it with a proper certificate. In this case, however, it conceals the deliberate and inexcusable failure of the Government to file vital portions of the record as required by Rule 38.

It has been respondents' contention throughout the proceedings on the motion for new trial and the amended motion for new trial that the proceedings on respondents' motion for remand which preceded the motion for new trial contained an independent basis for reversing the trial court's denial of these motions (and an independent basis for affirming the court below in its reversal of the trial court). These proceedings were a part of the record on both motions (see R. 554 and stipulation, paragraph (c), AR. 593-594). *The record of these proceedings is not even on file in this Court* nor are volumes IV-VII of the Bill of Exceptions herein (AR. 8-10).

(e) **In the absence of a prima facie valid transcript certiorari for diminution does not lie.**—Rule 10, par. 2 (made

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[12] Rule 38, par. 7, contemplates that this Court shall be furnished with ten printed copies of the record. Respondents under the procedure adopted by the Government will clearly be deprived of the privilege presently extended to other respondents to have the petition individually considered by all of the participating Justices of this Court. See Testimony of Mr. Justice Van Devanter in Hearing Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 68th Cong., 1st Sess., on S. 2060 and S. 2061, February 2, 1924, at 29. Frankfurter & Landis, *The Supreme Court under the Judiciary Act of 1925* (1928), 42 Harv. L. Rev. 1, 11.

applicable by Rule 44 to petitions for certiorari as far as may be) provides for the filing with the clerk of the lower court of praecipe and counter-praecipe or of a stipulation of the parties if the size of the transcript is to be reduced. (Cf. Robertson, Practice and Procedure in the Supreme Court (rev. ed.) p. 31.) The result is that the certificate of the clerk will ordinarily show either (1) that the transcript is a "full, true and correct copy of the entire record" of the case (cf. *Missouri, Kansas & Texas R. R. Co.* v. *Dinsmore*, 108 U. S. 30, 31), or (2) that the transcript was prepared on praecipe or on stipulation.

Either form of certificate would constitute at least *prima facie* proof that this Court has a lawful transcript before it. *Meyer* v. *Mansur & Tebbetts Implement Co.*, 85 Fed. 874, 875-876. The certificate here does neither. It merely certifies the correctness of the copy of the printed record filed February 5, 1945, and in no manner purports to constitute the entire transcript of proceedings in the cause. The cover of this printed record indicates that the complete transcript was filed earlier on January 15, 1945. Therefore there has not been filed in this Court even a *prima facie* valid transcript which might be remedied by certiorari for diminution. *Meyer* v. *Mansur & Tebbetts Implement Co., ubi supra;* cf. *Mo. Kansas & Texas R. Co.* v. *Dinsmore, ubi supra*, with *Hodges* v. *Vaughan*, 19 Wall. 12. Nor is this a case of inability of the petitioner to obtain a duly certified transcript. Cf. *In re Summers*, Sup. Ct. U. S., June 11, 1945 (89 L. ed. 1304, 1305).

The Government, by its petition apparently seeks a review of the decision of the court below involving a reexamination by this Court of the evidence to determine the propriety of its holding that the denial of new trial was an abuse of discretion by the trial court. The Government has thus arbitrarily chosen a portion of the record that it wishes the members of this Court to have before them in passing

on the petition for certiorari. But, as this Court has said (*Railroad Co.* v. *Schutte*, 100 U. S. 644, 647):

> "it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court."

It is the clear duty of the petitioner to see to it that the record is properly presented (cf. *Railway Co.* v. *Stewart*, 95 U. S. 279, 285) and when as here the clerk does not certify that the copy is the complete transcript of the record in the cause the petition should be dismissed. *Davis* v. *Harper*, 14 App. D. C. 298, 303. This Court will assume that the parts of the record not certified here were adequate to support the judgment of the Circuit Court of Appeals. Cf. *Hanson* v. *Boyd*, 161 U. S. 397, 407; *Zimmerman* v. *Harding*, 227 U. S. 489, 496; *Cooper* v. *Dasher*, 290 U. S. 106, 108; *Hagner* v. *United States*, 285 U. S. 427, 433.

It is not to be supposed that the underlying objective of dispatch in criminal cases is lightly to be nullified by failure to file a copy of the record as contemplated by the rules. Certainly, expedition in such cases is not to be defeated by condoning the overt breach of every rule of this Court looking to the presentation in this Court of the record contemplated by the rules governing certiorari procedure. Here the purported record is certified neither as constituting the full transcript of the record nor as containing the necessary parts thereof as designated by the parties.[13] Even should the Court be disposed to overlook the violation of its rules and grant the petition upon mere conjecture as to its merits, the Court could hardly overlook the fact that

[13] The practice of considering petition for certiorari on appendices bears no relation to the procedure adopted here. It will be recalled that the form of stipulation used by the Government in such cases recognizes the necessity of having the entire transcript of record in the lower court filed with this Court at the time the petition for certiorari is considered.

the cause could not be ripe for action on the merits, even after the granting of the petition, until a complete record was filed.

2. **The petition for certiorari was not served on respondents as required by the Rules of this Court.**—A further example of the cavalier manner in which the Government flouts the rules of this Court appears in the delay in service in this case. Rule 38, par. 3 of the Rules, provides:

> "Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the Court, or a justice thereof when the Court is not in session), and due proof of service shall be filed with the clerk."

The petition was filed on June 6, 1945. More than ten days thereafter, and without order of this Court or stipulation of counsel, oral or written (see Robertson, Practice and Procedure in the Supreme Court (rev. ed.) p. 53), the Solicitor General on June 19 proffered a copy of the petition and purported record with a demand for acknowledgment of service. This was rejected and a subsequent delivery similarly conditioned upon acknowledgment of service was also rejected. On August 1, copies of the petition and purported record were finally unconditionally delivered and delivery (but not due service) was acknowledged.

Particularly in a criminal case where the applicable rules are permeated with the objective of dispatch (see *United States ex rel. Coy* v. *United States*, 316 U. S. 342, 345; Memorandum from the Dep't of Justice, Sen. Rep. No. 627, 72d Cong., 1st Sess. (1932) 3; 52 Harv. L. Rev. 983) where no reason for delay has been suggested to counsel for respondents or to this Court, there would seem little excuse for deliberate disregard of the Rules of this Court.

Had the Government filed a printed petition for certiorari in time and within two or three days thereafter served such petition, this case might well have been disposed of by a prompt brief in opposition or waiver of the right to file a brief [14] before the end of the term. [15] Instead, the printed petition was not filed or proffered until one day after this Court had adjourned. In view of the renewed reiteration by the Government in its petition of the long period that has elapsed since verdict and judgment in these cases, it is important to note that the delay over the summer is attributable directly to the tardiness and breach of the Rule of this Court by the Government.

The inept manner in which the Government presents the petition in plain violation of all the rules of this Court, if countenanced, not only would give weight to the view that the scales are balanced in favor of the Government and against the individual but would in itself and by way of precedent in future cases seriously impair the benefit of the certiorari practice by preventing this Court from reaching an informed judgment as to the probable merits of the case before acting on the petition. Reference to the letter of August 1, 1943, addressed to counsel for defendants by the Honorable Harold Judson, Acting Solicitor General, and

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[14] Cf. *Bratcher* v. *United States*, No. 1369 O. T. 1944; pet. for certiorari filed June 12, 1945; Gov't Br. in Opp. waived; cert. den. June 18, 1945. *Di Melia* v. *Bowles*, No. 1374 O. T. 1944; pet. for certiorari filed June 14, 1945; Gov't Br. in Opp. waived; cert. den. June 18, 1945.

[15] It is to be noted that the only printing involved was the printing of the petition and the thirty-one pages containing the opinion and proceedings in the Circuit Court of Appeals (R. 207-238), both of which were in final form and not subject to editorial emendation. The Government has not even suggested printing of the record as a cause for its delay and probably in sincerity could not. In view of the expedited service which the Solicitor General is able to command in the Government Printing Office and which has often been exemplified in the filing of briefs in opposition, there would appear to be no serious question as to the ability of the Government to obtain a print of the petition filed June 6, within ten days thereafter.

by him filed with the Clerk of this Court leaves no doubt that the Government does not choose to pay even lip service to the Rules of this Court. In that letter the Government takes the flat position that the rules binding on private litigants in this Court may be disregarded by the Government and that resulting record defects must be corrected by the private party at the peril of having this Court determine the case on a partial record arbitrarily selected by the Government.

Conclusion

The petition not only fails to bring forward even the semblance of any reason recognized as moving this Court to grant certiorari but is presented in flagrant violation of the Rules of this Court.

Wherefore, it is respectfully submitted the petition should be denied.

September, 1945.

HOMER CUMMINGS,
Attorney for William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Defendants.

WILLIAM J. DEMPSEY,
Attorney for William R. Johnson, Defendant.

HAROLD R. SCHRADZKE,
Attorney for Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Defendants.